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December 8, 2004

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: WC Docket No. 04-313, CC Docket No. 01-338

Dear Ms. Dortch:

It is our understanding that the Commission is currently considering an impairment standard for dedicated transport that employs business line wire center density at very low levels as a threshold for determining routes where CLECs are impaired without access to dedicated dark fiber transport. Alpheus is steadfast in its belief that the proposed transport test represents a vast overcorrection to the concerns enumerated by the DC Circuit in *USTA II*. Instead of implementing the minimal changes to the transport impairment framework called for by the D.C Circuit, the proposed rules would return the telecommunications industry to the pre-1996 state of affairs. Alpheus has invested over 400 million dollars to use UNE dark fiber to bring competitive wholesale services and additional capacity to the marketplace, in part in reliance on the decisions of the Supreme Court and this Commission. Alpheus' network serves approximately 7,000-8,000 small businesses with 1 million voice grade equivalents.

Alpheus' understanding of the transport test under consideration indicates that the proposed test would result in the elimination of dark fiber transport UNEs in a vast number of the central offices in the five Texas markets Alpheus serves. Attached to this letter are maps of Dallas and Houston demonstrating the devastating impact the proposed test would have on the availability of transport UNEs in these two cities. The large red areas on the two maps show the extensive geographic areas where the Commission's test would result in a non-impairment finding as compared to the city boundaries of Dallas and Houston which appear in yellow. As demonstrated by the maps, the proposed test would eliminate dark fiber transport UNEs in well over half the geographic area of each of these two cities. Indeed, the Commission's proposed test places far too much weight on potential deployment when the market place reality is there is scant actual deployment in the red regions. In order to remedy the devastating impact of the proposed test, the Commission should require that both prongs of the test, *i.e.* both the business

access line threshold and the number of fiber-based collocators, be exceeded at both ends of the route as a prerequisite for a finding of non-impairment for dark fiber transport UNEs.

Further, the Commission should retain the aspect of its test that finds if there is impairment at one end of the route that route should be available as a UNE regardless of the other end of the route. This is consistent with the approach the Commission took in the *TRO*, one that remains undisturbed by the D.C Circuit.[1] The TRO determined that using a single collocator test "would effectively leverage the existence of competition in one location to remove the unbundling obligation to perhaps several other locations *without any proof that a requesting carrier could self-provide or utilize alternative transport reach those other locations.*"[2] The Commission rightly dismissed this manner of transport analysis in the *TRO* and nothing in *USTA II* requires its exhumation. Indeed, *USTA II* implicitly affirmed such an approach. Thus, the Commission should continue to require that any non-impairment finding for dark fiber transport UNEs be based upon meeting the test at both ends of a transport route as opposed to only one end.

Significantly, the devastating impact of the Commission's proposed transport test is evident in the attached maps and underscores the need for a multi-year transition from UNE dark fiber. At a minimum, a three-year transition is needed to allow CLECs that have invested vast sums of capital to construct state of the art networks in reliance on previous Commission orders and court decisions to construct new physical fiber facilities and transition efficiently their customers to such new facilities. The Commission cannot sanction a brief transition that would remove from the marketplace new efficient capacity resulting in likely disruption of customer service. Considering that the Commission approved a three-year transition for line sharing that remains good law, there is no reason to provide a shorter transition for CLECs that use UNE dark fiber. While line-sharing transitions may require conversion from a UNE line-shared loop to a UNE stand-alone loop, such transitions did not require deployment of entirely new facilities as is required to make the transition from UNE dark fiber to CLEC owned fiber facilities. For these reasons the Commission must afford dark fiber CLECs the ability to make an economic and efficient transition over a minimum three-year period.

Respectfully Submitted,

Joshua M. Bobeck/ER

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1 *See TRO* ¶ 401.

2 *TRO* ¶ 401 (emphasis supplied).

Enclosures

cc: Honorable Michael K. Powell
Honorable Kathleen Q. Abernathy
Honorable Michael J. Copps
Honorable Kevin J. Martin
Honorable Jonathan S. Adelstein
Christopher Libertelli
Matthew Brill
Jessica Rosenworcel
Daniel Gonzalez
Scott Bergmann
Jeffery Carlisle
Michelle Carey
Thomas Navin
Jeremy Miller
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Carol Simpson
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Austin Schlick
John Stanley